(6)

No. 01-7574

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ALLEN SATTAZAHN,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF

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CAPITAL CASE

QUESTIONS PRESENTED

I. Does the Double Jeopardy Clause of the Fifth Amendment bar imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, in which the trial court imposed a statutorily mandated life sentence when the capital sentencing jury failed to reach a unanimous verdict?

II. Whether a capital defendant's life and liberty interest in the mandatory imposition of a life sentence required by state law where the sentencing jury fails to reach a unanimous verdict was violated when the state sought the death sentence on retrial?

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STATEMENT OF THE CASE

Petitioner, David Sattazahn, was arrested on July 17, 1989, and was charged with criminal homicide and related crimes in the shooting death, some two years earlier, of Richard Boyer, a restaurant manager, who was attacked as he left work, after the close of business, with the day's receipts contained in a bank deposit bag. In its prosecution of Sattazahn, the Commonwealth, the respondent in this Court, sought the death penalty.

The evidence presented at Sattazahn's jury trial before the Berks County Court of Common Pleas established that he and a co-defendant, Jeffrey Scott Hammer,[1] had, over the course of several week-ends leading up to the crime, engaged in surveillance of the restaurant managed by Richard Boyer. Hidden away in a clearing they had made in an nearby wooded area, they studied the restaurant's operation and routine, learning that the restaurant did the most business on Sundays and also that Boyer, who was the last person to leave the restaurant each night, brought with him a money bag when he left. Record, N.T., 5/6/91, 488-90, 501-03.

At approximately 11:00 p.m. on Sunday, April 12, 1987, Boyer came out of the restaurant carrying a bank deposit bag containing the day's receipts, closed the restaurant, and started walking toward his pickup truck parked outside. Sattazahn and Hammer, who had been in their hiding place in the wooded area for about an hour waiting to rob Boyer, suddenly emerged, and with guns drawn, confronted Boyer. Sattazahn,

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[1]Hammer was also charged in the killing of Richard Boyer and plead guilty to third degree murder, robbery and related charges for which he was sentenced to an aggregate sentence of 19 to 55 years imprisonment on February 7, 1992. He was a witness for the Commonwealth in its case against Sattazahn.

who had a .22 caliber semi-automatic pistol, and Hammer, who had a .41 caliber revolver, told Boyer to drop the bag and put his hands up. Boyer put up his hands but threw the bag toward the restaurant. After being forced to retrieve it by Sattazahn, Boyer again threw it toward the restaurant's roof and tried to run away. Hammer heard Sattazahn fire once and then himself fired a single warning shot into the air. Sattazahn fired two or three more times and Boyer fell to the ground. Sattazahn and Hammer grabbed the bank deposit bag and fled. Record, N.T., 5/6/91, 494-96, 504-11.

The autopsy on the victim showed that Boyer had been shot five times: twice in the lower back; once in the left shoulder; once in the lower face; and once in the back of the head. All of the wounds were consistent with being inflicted by a .22 caliber bullet. Two slugs recovered from Boyer's body and five discharged cartridge cases found at the scene were identified as having been fired from the .22 caliber weapon Sattazahn was shown to own. Record, N.T. 5/3/91, 233-52. The jury found Sattazahn guilty of first, second and third degree murder, robbery and other related offenses. Record, N.T., 5/9/91, 893-94.

In the penalty phase which followed, the jury did not reach a decision as to Sattazahn's sentence, nor did it make any findings with respect to aggravating or mitigating circumstances.[2] J.A., 25-29. The trial court had determined, after three and one-half hours of deliberation, that the jury was hopelessly deadlocked and, at the request of the defense, dismissed the jury as hung. J.A., 22-24.

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[2]In the penalty phase, the Commonwealth had sought to prove one aggravating circumstance: that the defendant committed the killing while in the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6). The defense sought to prove two mitigating circumstances: the defendant's lack of a significant history of prior criminal convictions and his age at the time of the crime.

On February 14, 1992, in accordance with the provisions of Pennsylvania law, *see* 42 Pa.C.S. § 9711(c)(1)(v), Sattazahn was sentenced to a term of life imprisonment on the first degree murder conviction, and to consecutive terms of incarceration for other crimes of which he had been found guilty in the same trial.[3] J.A. 45-46. In addition, between September 19, 1991, and April 1, 1992, Sattazahn entered guilty pleas to and was sentenced on five burglaries and one robbery in Berks County, third degree murder committed on December 26, 1987, in Schuylkill County, and burglary charges in Lebanon County, J.A., 79.

Sattazahn then appealed his convictions for first degree murder and other crimes related to Richard Boyer's death to the Pennsylvania Superior Court. In its decision issued at *Commonwealth v. Sattazahn*, 428 Pa.Super. 413, 631 A.2d 597 (1993), that court ruled that the evidence adduced at trial was insufficient to support convictions on certain of the related crimes and dismissed those charges. With respect to the remaining convictions, including the first degree murder conviction, the Superior Court ruled that the trial judge had erred in instructing the jury, reversed the convictions and remanded for a new trial on those charges. The Superior Court denied a request for reargument by the Commonwealth and the Pennsylvania Supreme Court declined to review the case.[4]

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[3]Under Pennsylvania law, Sattazahn's convictions for second and third degree murder merged, for sentencing purposes, with his first degree murder conviction. *Commonwealth v. Williams*, 521 Pa. 556, 559 A.2d 25 (1989). For the remaining crimes of which he had been found guilty, he received a consecutive aggregate sentence of 12 to 24 years imprisonment.

[4]Review by the Pennsylvania Supreme Court is discretionary.

(continued...)

With respect to the impending new trial, the Commonwealth again served notice that it would seek the death penalty. That notice identified the specific aggravating circumstances the Commonwealth would seek to prove in the event a penalty phase were to be conducted. The Commonwealth's notice listed the same aggravating circumstance it had sought to prove at Sattazahn's first trial, *see* n.2, supra, and one not previously sought in those proceedings.[5] J.A., 47-50.

The defense filed a motion in the trial court to prevent the Commonwealth from seeking the death penalty and to prevent it from seeking to prove the added aggravating circumstance. That motion was denied. J.A., 54-67. The trial court's ruling was affirmed by the Superior Court which reviewed it in an interlocutory appeal. *Commonwealth v. Sattazahn*, No. 02274 PHILA 1995, *rearg. denied*, June 21, 1996. The Pennsylvania Supreme Court declined to grant review of the Superior Court's ruling. *Commonwealth v. Sattazahn*, 547 Pa. 742, 690 A.2d 1162 (1997).

At the re-trial which ensued, the jury convicted Sattazahn of the first degree murder of Richard Boyer and of

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[4](...continued)
Pa.R.A.P. 1112, 42 Pa.C.S. The Commonwealth filed a petition for allowance of appeal in that court and Sattazahn cross-petitioned. Initially, the court granted the Commonwealth's petition and denied Sattazahn's cross-petition. *Commonwealth v. Sattazahn*, 537 Pa. 639, 644 A.2d 162 (1994). After briefs were filed and argument held, the court dismissed the Commonwealth's appeal as improvidently granted. *Commonwealth v. Sattazahn*, 539 Pa. 270, 652 A.2d 293 (1994).

[5]The Commonwealth's notice added the aggravating circumstance found at 42 Pa.C.S. § 9711(d)(9), "that the defendant had a significant history of felony convictions involving the use or threat of violence to the person."

other related charges. In the penalty phase of the trial, the jury sentenced Sattazahn to death, unanimously concluding that the two aggravating circumstances which it had determined to exist outweighed the three mitigating circumstances it had found.[6] J.A., 85-88.

Sattazahn appealed to the Pennsylvania Supreme Court which affirmed the judgment of sentence in a decision dated November 27, 2000.[7] *Commonwealth v. Sattazahn*, 563 Pa. 533, 763 A.2d 359 (2000); J.A., 91-109. In that appeal, he maintained, *inter alia*, that the federal Due Process Clause and Double Jeopardy Clause prohibited the Commonwealth from seeking the death penalty in his retrial. The Pennsylvania Supreme Court, relying on *Bullington v. Missouri*, 451 U.S. 430 (1981), *Arizona v. Rumsey*, 467 U.S. 203 (1984), and *Poland v. Arizona*, 476 U.S. 147 (1986), held that, since the jury, as decisionmaker in the first trial, made no findings regarding the aggravating and mitigating circumstances and failed to reach a verdict, there was no acquittal on the merits of the death penalty and, therefore, no double jeopardy bar to seeking the death penalty at the second trial. *Commonwealth v. Sattazahn*, 563 Pa. 533, 548-49, 763 A.2d 359, 367-68. The Court also found that due process did not prevent the Commonwealth from seeking the death penalty on retrial since the United States Supreme Court had rejected the claim that a harsher sentence on retrial had a

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[6]The jury found the following aggravating circumstances: that the defendant committed the murder while in the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6), and that the defendant had a significant history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S. § 9711(d)(9). It also found these mitigating circumstances: the testimony of Sattazahn's mother and employer and his plea of guilty to third degree murder. J.A., 87-88.

[7]In Pennsylvania, capital cases are appealed directly to the Pennsylvania Supreme Court. 42 Pa.C.S. § 9711(h)(1).

chilling effect on the defendant's right to appeal. *Sattazahn*, 563 Pa. at 551, 763 A.2d at 368-69.

SUMMARY OF ARGUMENT

I. In *Poland v. Arizona*, 476 U.S. 147, this Court stated that the only exception to the "clean slate" rule on re-sentencing found in *North Carolina v. Pearce*, 395 U.S. 711 (1969), arises when the decisionmaker at the first trial or the reviewing court finds that the prosecution failed to prove its case. The determination that the prosecution has failed to prove its case with regard to whether death is the appropriate remedy requires a verdict of acquittal. When a jury reaches no verdict in the penalty phase of a capital case, it does not decide that the prosecution has not proved its case with regard to death - it simply makes no decision. With no finding that the prosecution has not proved its case, there has been no acquittal of death and the "clean slate" rule must apply when the defendant receives a new trial on appeal.

Although Pennsylvania's capital sentencing procedure resembles a trial and thus triggers the need to determine if double jeopardy protections are available to a defendant, the availability of such protections does not necessarily mean that the protections apply to bar a retrial on death. In the situation where the jury reaches no verdict and the judge, without reviewing the evidence or making any independent findings, thereafter imposes the required life sentence under the statute, there has never been an acquittal or any findings by the decisionmaker that the Commonwealth has failed to prove its case. This situation comports with the jurisprudence on hung juries, not acquittals. The situation where a jury has deadlocked because it is unable to decide a matter has never been equated with an acquittal. *Richardson v. United States*, 468 U.S. 317, 324-35 (1984).

The imposition of a life sentence by the judge, after the jury deadlocked at the penalty phase of Sattazahn's first trial, also fails to meet the definition of an acquittal. The jury made

no findings at all in failing to reach a verdict. The section of the statute under which the judge imposed the life sentence allows for no review of the evidence prior to imposition of sentence and requires no findings by the judge as to whether the prosecution proved its case. The record shows that this judge made no review of the evidence and no findings of any kind. Therefore, the life sentence imposed by the judge resolved no factual matters in the case and cannot be equated with an acquittal.

Since there has never been a decision by either jury or judge at the first trial that the prosecution failed to prove its case that death was the appropriate punishment for the murder committed by Sattazahn, then double jeopardy did not bar society from seeking the appropriate punishment for Sattazahn when new jeopardy attached as a result of his receiving a new trial on appeal. The government, in a situation where the defendant has never been acquitted on the merits of the death penalty, is permitted to pursue society's interest in punishing the defendant when his guilt is made clear after obtaining a "clean slate."

II. The Pennsylvania death penalty statute did not give Sattazahn a life and liberty interest in the default life sentence imposed by the judge after the jury deadlocked in the penalty phase of the trial because the imposition of the sentence was merely a ministerial act by the judge. Assuming *arguendo* that such an interest was created by the statute, the interest did not survive the vacation of the original default sentence. At most, Sattazahn had a life and liberty interest in the imposition of a life sentence if the jury deadlocked in the penalty phase of his trial. He received that life sentence. After he received a new trial on appeal, he lost any interest he had in the default sentence imposed at the first trial.

Nothing in due process jurisprudence suggests that a life and liberty interest can never be disturbed. The only legal theory that could support Sattazahn's suggestion that his life and liberty interest in the default life sentence is immutable is found in double jeopardy analysis. Due process simply requires that Sattazahn receive the proper process due before depriving him of a life and liberty interest.

The Supreme Court of Pennsylvania, which is the highest court in the Commonwealth, has interpreted the state's death penalty statute as clearly differentiating between a verdict by a jury and the life sentence imposed by the judge in the event of a deadlocked jury. In addition, the Court has found that the legislative decision to provide for a default life sentence does not in any way show an intent to preclude the death penalty upon reconviction. As the final arbiter of Pennsylvania law, the Supreme Court of Pennsylvania's interpretation of Pennsylvania law is binding on Sattazahn.

Once Sattazahn received a new trial after his first jury deadlocked on the death penalty, the prosecution could again seek the death penalty under the statute. He received the full panoply of pretrial, trial and appellate rights before that sentence was imposed, thereby protecting him from any arbitrary imposition of the death penalty. The Commonwealth provided notice and he had the opportunity to be heard at all stages of the second trial. Therefore, he received every protection to which he was entitled under the Due Process Clause. Neither the Due Process Clause nor the Pennsylvania statute created an entitlement in Sattazahn to the default life sentence beyond the first trial.

ARGUMENT

I. The Double Jeopardy Clause did not prohibit the capital retrial of David Sattazahn after he had obtained a new trial on appeal when the first jury had not acquitted him of the death penalty.

In *Poland v. Arizona*, 476 U.S. 147, this Court told states like Pennsylvania, whose laws provide for a sentencing procedure in capital cases which is similar to a trial, that the Fifth Amendment's Double Jeopardy Clause does not prevent the prosecution from seeking the death penalty in the retrial of a case if, in the previous trial, neither the sentencing jury nor an appellate court had rendered a decision determining that the prosecution had not proved its case. *Poland* did not alter, but rather clarified, the principle announced in *Bullington v. Missouri*, 451 U.S. 430, later reiterated in *Arizona v. Rumsey*, 467 U.S. 203, that constitutional protections against double jeopardy prevent the prosecution from seeking a death penalty upon retrial of a case where the jury in the prior trial agreed, or an appellate court had decided, that the evidence presented by the prosecution was insufficient to support the death penalty.

For purposes of double jeopardy jurisprudence, as the Court in *Poland* pointed out, a decision by a jury, or by an appellate court, that the prosecution had failed to prove its case represents the singular exception to the "clean slate" rule, which typically allows the prosecution to seek the same, or an even greater, punishment in the retrial of a case. *Poland*, 476 U.S. at 152 (citing *Bullington*, 451 U.S. at 443, and *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969)). Because a trial-like sentencing proceeding in a capital case had "the hallmarks of [a] trial on guilt or innocence," *see id.* at 439, the Court said that "the protection afforded by the Double Jeopardy Clause to one acquitted by a jury was also available to [a defendant in a capital case], with respect to the death penalty, at his retrial."

Id. at 446. Accordingly, at the conclusion of that type of proceeding, if the sentencing decisionmaker has returned a verdict which rejects the prosecution's case, there has been an "acquittal" as to the death penalty for that particular defendant and double jeopardy bars his exposure to that penalty upon retrial.

Poland, however, made it clear that it is an "acquittal" by the sentencing jury or by an appellate court on the question of what penalty the defendant should receive–and only an "acquittal"–which triggers the protections of double jeopardy. *Poland*, 476 U.S. at 153. Referring to what it had said earlier in *Bullington*, and in *Rumsey*, the Court stressed that constitutional protections against double jeopardy serve to enforce the "absolute finality" that our system of justice has chosen to accord to a verdict of acquittal, even an incorrect verdict. *Id.* at 153 and n. 2.

> '[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that "even though innocent he may be found guilty."' *United States v. Scott*, 437 U.S. 82, 91 (1978)(quoting *Green v. United States*, 355 U.S. 184, 188 (1957)).

Id. at 156 (citation in original). For purposes of a sentencing verdict, in keeping with the analogy *Bullington* used in discussing trial-like penalty proceedings in capital cases, an acquittal means the prosecution "received 'one fair opportunity to offer whatever proof it could assemble,'" but that the decisionmaker, by returning a verdict of "acquittal" had affirmatively determined that its evidence was insufficient to

justify imposition of the death penalty. *Bullington*, 451 U.S. at 446 (quoting *Burks v. United States*, 437 U.S. 1, 16 (1978)).

Rejecting the petitioners' argument in *Poland* that, on retrial, the prosecution was barred from asking the judge to find particular aggravating circumstances which the judge had previously declined to find, consistent with its explanation of the particular significance of an acquittal, the Court said that it is not the determination of individual factors which might figure in the decisionmaker's conclusion about the suitability of the death penalty, but the ultimate decision itself, which has significance for double jeopardy purposes. "Under *Bullington* and *Rumsey*, . . . the relevant inquiry . . . is whether the sentencing [decisionmaker] or the reviewing court has 'decid[ed] that the prosecution has not proved its case' for the death penalty and hence has 'acquitted' the [defendant]." *Poland*, 476 U.S. at 154 (quoting *Bullington*, 451 U.S. at 433). Because there had been no finding in *Poland* that "the evidence [was] legally insufficient to justify imposition of the death penalty, there was no death penalty "acquittal" . . . ." *Id.* at 157.

Here, too, there was no "acquittal," and therefore no double jeopardy bar to the Commonwealth's seeking the death penalty when it retried Sattazahn. The sentencing jury in his first trial did not find that the prosecution's evidence was legally insufficient to support a death penalty. The only thing it decided was that it couldn't decide. The Pennsylvania Supreme Court, guided by the Court's decisions in *Bullington*, *Rumsey* and *Poland*, correctly appreciated this distinction and gave it proper effect. The first jury's action was a non-decision which had no consequence for purposes of double jeopardy under the teachings of those cases. There is no support in either federal law or the law of Pennsylvania, for the notion that the inability on the part of a jury to decide a matter equates with a judgment as to the merits of the prosecution's case. *(See, e.g., Richardson v. United States*, 468 U.S. 317; *Commonwealth v. James*,

506 Pa. 526, 486 A.2d 376 (1985); *Commonwealth v. Marconi*, 340 Pa.Super. 463, 490 A.2d 871 (1985)).

Indeed, as *Richardson* reflects, this Court's double jeopardy jurisprudence has never seen a jury's failure to reach a verdict as an event which triggers the protections of double jeopardy. In order to decide that double jeopardy barred the Commonwealth from seeking the death penalty in Sattazahn's retrial, this Court must first find that the life sentence imposed upon Sattazahn at his first trial as a result of the jury's failure to reach a verdict triggered such protections. Such a holding is totally inconsistent with this Court's holdings in *Poland*, *Rumsey* and *Bullington*.

In *Poland v. Arizona*, 476 U.S. 147, this Court stated that "the relevant inquiry in [*Bullington* and *Rumsey*] is whether the sentencing judge or reviewing court has 'decid[ed] that the prosecution has not proved its case' for the death penalty and hence has 'acquitted' petitioners. *Bullington*, 451 U.S. at 443." *Poland*, 451 U.S. at 154. If that, in fact, is the relevant inquiry in determining whether the Double Jeopardy Clause bars reseeking the death penalty, then Sattazahn's argument must fail since neither the jury, the judge nor any reviewing court ever decided that the prosecution did not prove its case for the death penalty in his first trial. The defendant was never "acquitted" of the death penalty.

The Commonwealth agrees that the capital sentencing procedure in Pennsylvania resembles a trial for double jeopardy purposes, just as the Missouri and Arizona sentencing proceedings in *Bullington* and *Rumsey*, and that the procedure, therefore, triggers the need to determine if protection is available under the Double Jeopardy Clause. The fact that double jeopardy protection may be available does not mean that it necessarily bars a retrial on death. Unlike the juries in *Bullington* and *Rumsey*, the instant defendant's first jury failed

to reach a verdict after approximately three and one-half hours of deliberation and the defendant's attorney immediately asked that the jury be discharged. J.A., 22. Thereafter, the judge, without making any findings or even considering the evidence presented at the sentencing hearing, imposed a life sentence as required by Pennsylvania's capital sentencing statute. 42 Pa.C.S. § 9711(c)(1)(v).

Significant for purposes of double jeopardy analysis is the failure of the jury in Sattazahn's first trial to reach a verdict or make any findings. Their inaction resulted in the absence of a finding or decision about the sufficiency of the Commonwealth's proof. The fact that the judge was then required to impose a life sentence did not transform the lack of findings as to the sufficiency of the evidence into an acquittal.

In *Rumsey*, this court held that the double jeopardy principle in both *Bullington* and *Rumsey* was that " . . . an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Rumsey*, 476 U.S. at 211. However, the reason a jury is hung is precisely because there is not a decision on the merits. The fact that the statute requires the presiding judge to impose a life sentence in the event of a deadlocked jury does not transform the lack of a verdict into a decision on the merits. If there is no decision on the merits, there is no acquittal and, therefore, no bar to retrial on the same charge under the Double Jeopardy Clause.

In *Bullington*, this Court first applied the protections of double jeopardy to a sentencing proceeding. *Bullington v. Missouri*, 451 U.S. 430. It was the first case in which this Court reviewed a capital sentence proceeding which resembled a trial on the question of guilt or innocence. In *Bullington*, the defendant was convicted of capital murder by a jury and, after a separate capital sentencing proceeding, the same jury

returned a verdict of life imprisonment. The trial court subsequently granted Bullington's motion for a new trial. The prosecution again sought the death penalty at the retrial. *Bullington*, 451 U.S. at 435-36. After granting *certiorari*, this Court held that the prosecution was barred from reseeking the death penalty.

In reaching this decision, this Court discussed its resistance to extending double jeopardy principles to sentencing because "[t]he imposition of a particular sentence usually is not regarded as an 'acquittal' of any more serious sentence that could have been imposed." *Bullington*, 451 U.S. at 438. However, this Court recognized that the capital sentencing proceeding before it in *Bullington* differed from the sentencing proceedings it had considered in previous cases where it had rejected the applicability of double jeopardy protections to sentencing. *Bullington*, 451 U.S. at 438.

In the sentencing proceeding in *Bullington*, the prosecution had the burden to prove certain facts beyond a reasonable doubt in order to obtain the harsher of the only two sentencing alternatives, life imprisonment and death. The hearing at which the prosecution sought to prove these facts was in all relevant respects like the trial on the question of guilt or innocence. The jury was provided with standards to guide it in making the choice between the two alternatives and had to make specific findings regarding the aggravating and mitigating circumstances to render a verdict imposing the death penalty. *Bullington*, 451 U.S. at 438.

This Court recognized that one of the results of these differences in sentencing proceedings was that, in the usual sentencing proceeding, it was impossible to conclude that the reason for imposing less than the statutory maximum sentence was the sentencer's decision that the government had failed to prove its case. *Bullington*, 451 U.S. at 443. "By enacting a

capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.'" *Bullington*, 451 U.S. at 444. What *Bullington* does not address is what happens when the jury fails to make this determination.

Because of the clear verdict by the sentencer in *Bullington*, which sentenced the defendant to life imprisonment after a sentencing proceeding which was like the trial on his guilt or innocence, the Double Jeopardy Clause precluded the government from again seeking the death penalty on retrial. *Bullington*, 451 U.S. at 446. What *Bullington* does not hold is that the mere imposition of a life sentence by operation of statute where no verdict is rendered, in a capital sentencing proceeding which resembles a trial on guilt or innocence, is sufficient to invoke the Double Jeopardy Clause to bar the death sentence upon retrial.

In *Arizona v. Rumsey*, 467 U.S. 203, this Court again reviewed a capital sentence proceeding which resembled a trial on the question of guilt or innocence. The facts in *Rumsey* were that Rumsey had been convicted by a jury of robbery and first degree murder. The trial judge then conducted a separate sentencing hearing to determine whether death was the appropriate sentence. The trial judge subsequently returned a "special verdict" setting forth his findings on the aggravating and mitigating circumstances. Finding no aggravating or mitigating circumstances, the trial court imposed a life sentence. *Rumsey*, 467 U.S. at 205-206. This Court stated that the relevant double jeopardy principle in both *Bullington* and *Rumsey* was that "**an acquittal on the merits by the sole decisionmaker** in the proceeding is final and bars retrial on the same charge." *Rumsey*, 467 U.S. at 211 (**emphasis added**). This Court went on to recognize that the initial sentence imposed by the sentencer was an acquittal on the merits of whether death

was an appropriate punishment for the offense. *Rumsey*, 467 U.S. at 211. Specifically, this Court said: "That judgment, **based on findings sufficient to establish legal entitlement to the life sentence**, amounts to an acquittal on the merits. . ." *Rumsey*, 467 U.S. at 211 (**emphasis added**). Therefore, the factors considered by this Court in *Rumsey* with regard to the double jeopardy bar on seeking death at the second trial went beyond the mere imposition of a life sentence at the first trial. They included an acquittal on the merits by the sole decisionmaker and findings made by the decisionmaker which were sufficient to establish legal entitlement to the life sentence.

In *Poland*, this Court revisited *Rumsey* and *Bullington* and clearly limited its holding in *Bullington*. The defendants in *Poland* were convicted by a jury of first degree murder. The trial judge then sat as decisionmaker at a separate sentencing hearing where he would determine what aggravating and mitigating circumstances were proven and then weigh these circumstances to determine a sentence of life imprisonment or death. The State presented evidence of two aggravating circumstances: that the crime was committed "in expectation of the receipt of something of pecuniary value" and that the crime had been committed in an "especially heinous, cruel or depraved manner." The judge found only the "especially heinous" circumstance and sentenced the defendants to death. On appeal, the Arizona Supreme Court held that there was insufficient evidence to support the judge's finding of the "especially heinous" circumstance and that the trial court misinterpreted the law in rejecting the application of the "pecuniary value" circumstance. On remand, the defendants were again tried and convicted of first degree murder. The State again sought death and argued the same two aggravating circumstances, presenting additional evidence. The judge found both circumstances and sentenced the defendants to death. After granting *certiorari*, this Court considered whether

the Double Jeopardy Clause barred the reimposition of the death penalty.

The defendants argued that they had been acquitted of both aggravating circumstances, claiming that the trial court acquitted them of the "pecuniary gain" circumstance when it did not find that circumstance at the first sentencing and the appellate court acquitted them of the "especially heinous" circumstance when it found insufficient evidence to support it on appeal. After reviewing the record and finding that at no point in the first capital sentencing hearing and appeal did either the sentencer or the reviewing court hold that the prosecution failed to prove its case that death was the appropriate punishment, this Court stated:

> We reject the fundamental premise of petitioners' argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. Bullington indicates that **the proper inquiry is whether the sentencer or the reviewing court has "decided that the prosecution has not proved its case" that the death penalty is appropriate**. We are not prepared to extend Bullington further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance. Such an approach would push the analogy on which Bullington is based past the breaking point.
>
> Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice"

> between the alternative verdicts of death and life imprisonment. 451 U.S. at 438. Thus, under Arizona's capital sentencing scheme, **the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant** (i.e., require a death penalty), **and the failure to find any particular aggravating circumstance does not "acquit" a defendant** (i.e., preclude the death penalty).

Poland, 476 U.S. at 155 (**emphasis added**).

If a finding of particular aggravating circumstance does not by itself convict and the failure to find a particular circumstance does not acquit a defendant of the death penalty under *Poland*, then how does the failure to reach a verdict at all become an acquittal? In fact, Sattazahn had been convicted of first degree murder and robbery at the guilt phase of the trial. Therefore, the jury necessarily had already found that the government had proved its aggravating circumstance - that the defendant had committed the killing while in the perpetration of a felony[8] - beyond a reasonable doubt. Therefore, there can be no question in this case, despite the deadlocked jury, that the government had produced sufficient evidence to prove its case for death.

The deciding factor for this Court in applying double jeopardy protections to particular sentencing proceedings has been that the capital sentencing proceedings under review were like a trial on guilt or innocence. If the capital sentencing proceeding is like a trial to warrant double jeopardy protections, than it must be like a trial with regard to the definition of acquittals.

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[8] 42 Pa.C.S. § 9711(d)(6)

At his first trial in 1991, the jury convicted David Sattazahn of first degree murder. At the sentencing proceeding following the guilt phase of the trial, the jury deadlocked on the issue of death. Sattazahn's counsel immediately requested that the jury be discharged and a life sentence be imposed. After speaking briefly with the jury, the trial court did in fact discharge the jury and imposed a sentence of life imprisonment as mandated by 42 Pa.C.S. § 9711(c)(1)(v). Neither the jury nor the judge made any findings with regard to the evidence presented by the government.

In the months following the first degree murder conviction, the defendant entered guilty pleas to a 1987 murder in Schuylkill County, five 1989 burglaries and one 1989 robbery in Berks County, and other burglary charges in Lebanon County. These cases had been charged but deferred until his trial was completed, which had allowed him to offer as a mitigating circumstance his lack of a significant history of prior criminal convictions. He also chose to file an appeal from his conviction for first degree murder and the life sentence imposed by the trial court. He sought and obtained a new trial based on a jury instruction.

After the defendant filed his appeal, the Supreme Court of Pennsylvania decided *Commonwealth v. Martorano*, 535 Pa. 178, 634 A.2d 1063 (1993), a case which addressed the Commonwealth's ability to seek death on a capital retrial where the jury had deadlocked in the first trial on the issue of death. The state court examined federal precedent and concluded that, in *Poland v. Arizona*, 476 U.S. 147, this Court had reaffirmed the application of the 'clean slate' rule of *North Carolina v. Pearce*, 395 U.S. 711, unless the sentencing judge or reviewing court has decided that the prosecution has not proved its case for the death penalty. *Martorano*, 535 Pa. at 193, 634 A.2d at 1070.

Sattazahn's first jury made no findings and reached no verdict. The trial court was not a decisionmaker at all, but rather an administrator of a statutorily compelled life sentence. No findings of any kind were made, let alone findings sufficient to establish any legal entitlement to a life sentence. Since there had been no decision by the jury, the sentencing judge or the reviewing court that the prosecution had not proved its case for death at Sattazahn's first sentencing proceeding, the Commonwealth again sought the death penalty at the second trial pursuant to this Court's 1986 decision in *Poland*. The second jury convicted Sattazahn of first degree murder and sentenced him to death.

The defendant argues that, in the first trial, the prosecution failed to meet its burden of proving the aggravating circumstances beyond a reasonable doubt because it failed to persuade all twelve capital jurors that death was the appropriate punishment. Petitioner's Brief, at 16-17. However, the failure to persuade has traditionally resulted in a hung jury at a trial. In fact, this Court has recognized that "[t]he argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country." *Arizona v. Washington*, 434 U.S. 497, 509 (1978). It is only the failure to produce sufficient evidence that has caused double jeopardy violations.

The Commonwealth's burden of proof consists of the burden of production and the burden of persuasion. *Mullaney v. Wilbur*, 421 U.S. 684, 702 n. 31 (1975). As this Court has stated:

> . . . Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of

> proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Speiser v. Randall, 357 U.S. 513, 525 (1958).

The defendant cites to *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), for the proposition that, when a trial court enters a directed verdict after discharging a deadlocked jury, that directed verdict constitutes a judgment of acquittal. Petitioner's Brief, at 25. However, in *Martin Linen*, the directed verdict was entered after the District Court evaluated the evidence and determined that it was legally insufficient to sustain a conviction. *Martin Linen*, 430 U.S. at 572. At Sattazahn's first trial, the judge who imposed the life sentence conducted no evaluation of the evidence and neither the jury nor the judge made a finding that the evidence was insufficient to impose death.

In the same manner, the defendant cites to *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), as holding that, once a defendant is acquitted, whether by the jury or the court, the defendant cannot be subjected to post-acquittal, fact finding proceedings going to guilt or innocence without violating the Double Jeopardy Clause. Petitioner's Brief, at 25. While that, in fact, is the holding of *Smalis*, this Court reached that holding by reasoning that the grant of a demurrer by the trial court is an acquittal because it is a ruling by the trial court that the government's evidence is insufficient to establish his factual guilt. *Smalis*, 476 U.S. at 144. Once again, neither the jury nor the judge at Sattazahn's first trial ever determined that the evidence was insufficient to impose death.

Neither *Martin Linen* nor *Smalis* stand for the proposition that when the government fails to meet its burden of persuasion it is barred from retrial by the Double Jeopardy

Clause. Rather, they stand for the proposition that, when the government fails to meet its burden of production, the Double Jeopardy Clause bars retrial.

In *United States v. Perez*, 22 U.S. 579 (1924), the government failed to meet its burden of persuasion and the jury hung on the defendant's guilt in a capital case. This Court held that "...the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence." *Perez*, 22 U.S. at 580. In Sattazahn's first trial, the Commonwealth failed to meet its burden of persuasion in the sentencing proceeding and the jury did not return a verdict. Just as in *Perez*, the defendant was not convicted or acquitted and there should be no bar to a future trial.

In *Richardson v. United States*, 468 U.S. 317, this Court reiterated that "we have constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Richardson*, 468 U.S. at 324. This Court held that double jeopardy protection only applies "if there has been some event, such as an acquittal, which terminates the original jeopardy" and that a hung jury is not the equivalent of an acquittal. *Richardson*, 468 U.S. at 325. "[T]he failure of a jury to reach a verdict is not an event which terminates jeopardy." *Richardson*, 468 U.S. at 325.

The determination that jeopardy has attached begins but does not end the inquiry into whether retrial is barred by the Double Jeopardy Clause. *Serfass v. United States*, 420 U.S. 377, 389 (1975). The Commonwealth agrees with the defendant that jeopardy attaches to the Pennsylvania capital sentencing proceeding, as determined by this Court in *Bullington* and *Rumsey*. The Commonwealth does not agree with the defendant's conclusion that this Court has held that the nature

of the proceeding necessarily requires a double jeopardy bar to seeking the death penalty on retrial.

In interpreting the Double Jeopardy Clause, this Court has disparaged the use of rigid mechanical rules. *Serfass*, 420 U.S. at 389. While the prohibition against multiple trials is the constitutional principle in double jeopardy analysis, the bar to retrial is not absolute. *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980). It is an acquittal which bars retrial, even if the acquittal is an error. *DiFrancesco*, 449 U.S. at 132; *United States v. Scott*, 437 U.S. 83, 91; *Bullington*, 451 U.S. at 445; *Rumsey*, 467 U.S. at 211; *Poland*, 476 U.S. at 156-57.

This Court has repeatedly recognized that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *Martin Linen*, 430 U.S. at 571; *Serfass*, 420 U.S. at 392; *Scott*, 427 U.S. at 96-97. "[A]n appeal is not barred [on double jeopardy grounds] simply because a ruling in favor of a defendant 'is based upon facts outside the face of the indictment...'" *Scott*, 437 U.S. at 96. An acquittal for purposes of double jeopardy occurs "only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charges.'" *Scott*, 437 U.S. at 97, (quoting *Martin Linen*, 430 U.S. at 571).

This Court has recognized that:

> ...a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise. In other circumstances, this Court has had no difficulty in distinguishing between those rulings which relate to the 'ultimate question of guilt or innocence' and those which serve other purposes.

Scott, 437 U.S. at 98, n.11 (citation omitted). The mandatory ruling in Sattazahn's first trial that resulted in the imposition of a life sentence did not relate in any way to the ultimate question of whether death was the appropriate sentence for Sattazahn.

Although Sattazahn repeatedly refers to the life sentence imposed by the trial court at his first trial as an "acquittal of death" or a "directed life verdict," the life sentence imposed simply fails to meet the accepted definition of acquittal. The imposition of the life sentence in this case made no resolution of any of the factual elements involved in the capital sentencing proceeding. First of all, the jury made no findings at all in failing to reach a verdict. Then the judge simply followed the statute and, without considering the evidence presented, imposed a sentence of life, again with no findings of any factual elements.

Sattazahn states that "[t]his Court's conception of an "acquittal" of death is the imposition of a life sentence after a trial-like proceeding tried to completion" and cites to *Schiro v. Farley*, 510 U.S. 222, 232 (1994); *Poland v. Arizona*, 476 U.S. at 152; *Smalis v. Pennsylvania*, 476 U.S. at 145 n.8; *Arizona v. Rumsey*, 467 U.S. at 211; and *Bullington v. Missouri*, 451 U.S. at 445-46. Petitioner's Brief, at 29. The Commonwealth contends that Sattazahn overstates each of the cited cases.

As previously set forth, *Bullington* and *Rumsey* resulted from definitive life sentences imposed by the decision makers, thus logically resulting in acquittals of death. *Poland* specifically states that the relevant inquiry arising from *Bullington* and *Rumsey* was whether the sentencer or the reviewing court has determined that the prosecution has not proved its case for the death penalty - not merely whether a life

sentence was imposed at the conclusion of a trial-like proceeding. *Poland*, 476 U.S. at 154. *Poland* stated that *Bullington* and *Rumsey* require "an acquittal on the merits by the sole decision maker" for the decision to be final, barring retrial on the same issue, and refused to extend *Bullingon* further. *Poland*, 476 U.S. at 154, 156-67.

Sattazahn argues that the *Smalis* trial court's grant of a demurrer is the same as the life sentence imposed in the instant case. This argument ignores the fact that the ruling in *Smalis* resulted from the trial court's decision that the evidence presented was insufficient to go to the jury. This decision by the judge in *Smalis* could only have been reached after he reviewed the evidence and determined that the government failed to meet its burden of production, following established precedent with regard to acquittals, which would bar retrial. In the instant case, the judge reviewed no evidence and made no determination regarding the government's evidence, thereby corresponding to established precedent with regard to hung juries, which allows retrials.

The argument raised in *Schiro* was that the government was precluded by the Double Jeopardy Clause and the doctrine of collateral estoppel from seeking the death penalty after the guilt phase jury found him guilty of the count which charged that he killed his victim while committing the crime of rape, and left the verdict slip blank as to the count which charged that he knowingly killed her. Schiro argued that the jury had acquitted him of an intentional killing and that, therefore, since the aggravating factor which allowed the government to seek death was that the defendant committed the murder while intentionally killing the victim while committing or attempting to commit rape, the government was barred from relitigating the issue of the intentional murder. *Schiro*, 510 U.S. at 226-27. This Court ruled against Schiro on both claims, finding that the government simply conducted a single sentencing hearing in

the course of a single prosecution and that Schiro did not meet his burden of establishing the factual predicate for the application of the collateral estoppel doctrine, since he failed to show that an issue of ultimate fact had been determined in his favor. *Schiro*, 510 U.S. at 231-32.

The citation to *Schiro* provided by Sattazahn actually deals with a portion of the court's discussion regarding collateral estoppel. The Double Jeopardy Clause incorporates the doctrine of collateral estoppel or issue preclusion in criminal proceedings. *Schiro*, 510 U.S. at 232. Collateral estoppel holds that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Schiro*, 510 U.S. at 232 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). The first inquiry in collateral estoppel analysis is whether a rational jury could have grounded its verdict upon an issue other than the issue in question. *Schiro*, 510 U.S. at 233.

The *Schiro* Court found that the jury could have grounded its verdict on an issue other than intent to kill. *Schiro*, 510 U.S. at 233. In conclusion, this Court stated:

> The failure to return a verdict does not have collateral estoppel effect, however, unless the record establishes that the issue was actually and necessarily decided in the defendant's favor. As explained above, our cases require an examination of the entire record to determine whether the jury could have "grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Schiro, 510 U.S. at 236 (citing *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) and *Dowling v. United States*, 493 U.S. 342, 350 (1990)).

In the same way, Sattazahn's first jury could have failed to reach a verdict for reasons other than finding that the prosecution failed to meet its burden of proof. In fact, as stated previously, based on the jury's conviction at the guilt phase of first degree murder and robbery, it would be impossible to find that the jury had actually and necessarily decided that the Commonwealth had failed to prove the aggravating circumstance that the murder was committed in the perpetration of a felony.

In this case, Sattazahn, at the first mention of deadlock by the jury, immediately requested that the jury be discharged.[9] This request came after only three and one-half hours of deliberation on the very serious question of imposing the death penalty.[10] Sattazahn sought this jury dismissal even though he had, in effect, manipulated the evidence which the jury could hear by deferring his many other criminal cases until after the conclusion of this trial. He could thus argue to this jury that he had no significant history of prior criminal convictions. He had the option to request that this jury be encouraged to reach a verdict - a conviction or acquittal on the merits for death. He

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[9]"[A motion for mistrial] by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *United States v. Scott*, 437 U.S. at 93.

[10]This Court has recognized both that the object of the jury system is to secure unanimity among the jurors based on the comparison of view and argument among the jurors, and that "...in a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'" Therefore, this Court has approved the use of a supplemental charge to encourage a jury who reports a deadlock to engage in further deliberations. *Jones v. United States*, 527 U.S. 373, 382 (1999).

chose, however, to ask for the jury to be dismissed without reaching a verdict.

In rejecting the argument that a harsher sentence on retrial has a "chilling effect" on the defendant's right to appeal or collaterally attack his conviction, this Court stated that the Constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973).

Sattazahn had choices to make during and after his first trial. Sattazahn chose to delay his other criminal cases so that he could argue as mitigating circumstances to the first jury that he had no significant criminal record. Although there had never been a finding that the government failed to prove its case against the death penalty since the jury had simply deadlocked, Sattazahn chose to ask that the jury be discharged and to appeal his conviction. Sattazahn pursued and obtained the "clean slate" promised by *North Carolina v. Pearce*, 395 U.S. 711. According to *Poland*, when there has been "no death penalty acquittal," "[t]he Double Jeopardy Clause d[oes] not foreclose a second sentencing hearing at which the 'clean slate' rule applied." *Poland*, 476 U.S. at 157. The government, in a situation where the defendant has never been acquitted on the merits of the death penalty, is permitted to pursue society's interest in punishing the defendant whose guilt of first degree murder is clear after he obtains that clean slate. *(See Pearce*, 395 U.S. at 721 n.18).

Although the primary evil that double jeopardy guards against is successive prosecutions, in this case, Sattazahn sought the retrial. He requested and received the opportunity for a new jeopardy to attach so that he could have a new trial. To permit a new sentencing proceeding as part of the new jeopardy does not violate the Double Jeopardy Clause. Society

should not lose the right to seek the appropriate punishment for the crime Sattazahn committed when there has never been a finding that the government failed to prove that death was the appropriate punishment for the defendant's crime.

II. Pennsylvania law does not create a life and liberty interest in a life sentence imposed as a result of a deadlocked jury that survives the grant of a new trial on appeal.

The substance of Petitioner's due process claim appears to be not only that the Pennsylvania Death Penalty Statute gives him a life and liberty interest in the life sentence imposed by the judge after a jury deadlock, but also that this life and liberty interest in the life sentence is undisturbable for all time. This legal theory is unsupported in this Court's due process jurisprudence.

First, Sattazahn does not clearly explain how the life sentence he received is rendered immutable. Assuming *arguendo* that a life and liberty interest exists in this case under the reasoning of the cases cited by Petitioner, none of those cases suggest that such an interest is fixed in time. *Evitts v. Lucey*, 469 U.S. 387 (1985) (statutory right to appeal requires effective assistance of counsel; court did not hold that there must be a dismissal rather than a second appeal); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (statutory right to sentencing by jury creates liberty interest for defendant in jury being informed of all sentences it is authorized to impose; court did not hold that re-sentencing could not be held); *Ford v. Wainwright*, 477 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (Florida law created liberty interest in not being executed while incompetent but did not bar execution forever and triggers minimal due process demands); *Ohio Adult Parole Authority v. Woodward*, 477 U.S. 272, 288-89 (1998) (O'Connor, Jr., with Souter, Ginsburg & Breyer, JJ., concurring) (inmate seeking clemency must be accorded some minimal procedural

safeguards but notice and opportunity to be heard satisfied requirement).

The Commonwealth suggests that the only legal theory that would support an immutable interest in a life sentence is found in double jeopardy jurisprudence. The Due Process Clause simply does not bestow such permanence to a sentence imposed before a defendant obtains a retrial. *See Bullington v. Missouri*, 451 U.S. 430 (retrial seeking death barred by Double Jeopardy Clause when first jury acquitted the defendant of death); *Arizona v. Rumsey*, 467 U.S. 203 (retrial seeking death barred by Double Jeopardy Clause when first jury acquitted the defendant of death). *Compare North Carolina v. Pearce*, 395 U.S. 711 (due process forbids vindictiveness against defendant in sentencing at retrial but does not forbid the imposition of a higher sentence); *Chaffin v. Stynchombe*, 412 U.S. 17 (due process does not forbid the possibility of a higher sentence on retrial). Therefore, any claim that Sattazahn has an irrefutable right to the life sentence must be addressed in terms of the protection of the Double Jeopardy Clause, not the Due Process Clause.

Secondly, the Pennsylvania legislature did not create a life and liberty interest for Sattazahn in the default life sentence imposed by a judge when the jury was discharged at Sattazahn's request after it deadlocked in the penalty phase of his trial. The imposition of the default life sentence was simply a ministerial act by the judge, "'based on [no] findings which resolve some factual matter, [and] is not sufficient to establish legal entitlement to a life sentence.'" *Commonwealth v. Sattazahn*, 563 Pa. at 548, 763 A.2d at 367 (quoting *Commonwealth v. Martorano*, 535 Pa. at 194, 634 A.2d at 1070). The provision for a default sentence in the death penalty statute in the event of a deadlocked jury does not, in and of itself, create any life and liberty interest in the defendant.

In the event that this Court believes that such a life and liberty interest was created by the statute, the Commonwealth contends that any life and liberty interest created by the statute does not survive the vacation of the original default life sentence. At most, the defendant had a life and liberty interest in the imposition of a life sentence in the event of a deadlock by the jury on death. Sattazahn received that life sentence. Once he obtained a new trial on appeal, he no longer had any life and liberty interest in a sentence imposed at his first trial. Nothing in due process jurisprudence says that a life and liberty interest once created can never be disturbed. The law merely states that, once a protected interest is found, the amount of process due is determined by considering the private interest that will be affected by official action, the risk of erroneous deprivation through the procedures used, and the government's interest in its action. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The greater the potential deprivation of private interest, the greater the process due. *Id.*, 424 U.S. at 341.

The Pennsylvania legislature established sentencing procedures for jury trials when the verdict of first degree murder is returned by the jury. 42 Pa.C.S. § 9711(a)(1)[11] The clear language of this statute provides that a death penalty proceeding is mandated following a first degree murder

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[11]**§ 9711. Sentencing procedure for murder of the first degree**

(a) Procedure in jury trials.–

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.

conviction.[12] The Pennsylvania legislature made no distinction between a first trial and a retrial in requiring a death penalty proceeding after a first degree murder conviction.

The statute also addresses how the court shall instruct the jury with regard to a sentencing verdict.[13] 42 Pa.C.S. § 9711(c)(1)(iv). For a verdict to be returned by the jury, there must be unanimity. The Pennsylvania Rules of Criminal Procedure further provide that there must also be specific findings by the jury as to the basis of the verdict, whether it is life or death. Pa.R.Crim.P. 358A, 42 Pa.C.S.[14]

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[12]The Commonwealth may determine that there are no aggravating circumstances in a particular case and thus choose not to seek the death penalty. That decision is the Commonwealth's decision to make. *See Commonwealth v. Buck*, 551 Pa. 184, 190, 709 A.2d 892, 895-96 (1998).

[13]**(c) Instructions to the jury.–**

*** *** ***

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

42 Pa.C.S. § 9711(c)(1)(iv).

[14]Rule 358A of the Pennsylvania Rules of Criminal Procedure was adopted February 1, 1989, effective July 1, 1989, and was renumbered as Rule 807, effective April 1; 2001.

The Pennsylvania legislature also provided that, if the jury is unable to reach a verdict, the judge may discharge the jury and shall impose a life sentence. 42 Pa.C.S. § 9711(c)(1)(v)[15] This portion of the statute does not address the effect that entry of a default life sentence following a first trial has upon the availability of the death penalty following a retrial. Importantly, it never refers to the entry of the life sentence in this situation as a verdict.

The Supreme Court of Pennsylvania has reviewed the statute and interpreted its provisions to specifically make a distinction between the life sentence imposed as a result of a unanimous jury verdict and that imposed as a result of a jury deadlock. In *Martorano* and then in *Sattazahn*, the state court recognized that subsection (iv) specifies the possible jury verdicts that can be entered after conviction for first degree murder and that subsection (v) specifies the procedure to be followed when there was no jury verdict. *Sattazahn*, 563 Pa. at 549, 763 A.2d at 368 (quoting *Martorano*, 535 Pa. at 197-98, 634 A.2d at 1072). The *Martorano* court stated that, reading both sections together and in their entirety, "[i]f the jury's failure to reach a unanimous agreement as to sentence could function as a verdict, subsection (v) would be superfluous" because when there is a verdict, the court does not discharge the jury, but

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[15](c) Instructions to the jury.–

*** *** ***

(v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to sentence, in which case the court shall sentence the defendant to life imprisonment.

42 Pa.C.S. § 9711(c)(1)(v)

receives and records the verdict, imposing the sentence fixed by the jury. *Sattazahn*, 563 Pa. at 549, 763 A.2d at 367-68 (quoting *Martorano*, 535 Pa. at 197-98, 634 A.2d at 1072-73).

This interpretation of the state statute by the highest court in the state comports with principles of statutory construction under both state and federal law. (*See* 1 Pa.C.S. § 1922(2); *Commonwealth v. Sitkin's Junk Co.*, 412 Pa. 132, 194 A.2d 199 (1963) (in construction of a statute, it is presumed that every word, sentence or provision therein is intended for some purpose and accordingly must be given effect); *Duncan v. Walker*, 533 U.S. 167 (2001) (where Congress includes particular language in one section of a statute but omits it in another section of the same statute, it is generally presumed that Congress acts intentionally and purposely in this inclusion or exclusion)).

Based on its review of the Pennsylvania death penalty statute, the Supreme Court of Pennsylvania found that nothing in the statute precluded imposition of the death penalty upon re-conviction, as long as the sentencer found sufficient evidence to warrant it. The state court reasoned that, since the judge in imposing the mandatory sentence makes no findings which resolve some factual matter, the defendant had no legal entitlement to a life sentence under the Pennsylvania capital sentencing statute. *Sattazahn*, 563 Pa. at 763 A.2d at 368 (quoting *Martorano*, 535 Pa. at 194, 634 A.2d at 1070).

Yet Sattazahn claims that the Pennsylvania statute gave him a substantial and legitimate expectation that, after he received a judicially imposed "directed verdict for life" resulting from a non-unanimous jury, he would not later be subject to death for the first degree murder he committed. Petitioner's Brief, at 37. He bases his argument on: (1) the fact that the jury was instructed that the judge would impose life if they were deadlocked; (2) the mandatory nature of the

imposition of the life sentence upon deadlock; (3) the fact that Pennsylvania makes no statutory distinction of any kind between the treatment of life sentences imposed by "judicially directed verdicts" and a jury's unanimous verdict; and (4) the failure to inform the jury or the defendant that a successful appeal could render the life sentence imposed a nullity. *Id.*, at 37-38.

First, as noted above, nowhere does the statute refer to the life sentence mandated by a deadlocked jury as a verdict, therefore, the defendant's reference to a "directed verdict for life" and to "judicially directed verdicts" is misleading. Second, the reasons offered by the defendant fail to establish any ongoing life or liberty interest in the life sentence imposed at his first trial.

The first and fourth reasons offered by Sattazahn are that the judge instructed the jury that, if the jury could not reach a verdict, the court would impose a life sentence and that the judge did not instruct the jury that, if the defendant appealed and won, the Commonwealth might again seek the death penalty. As this Court has recognized, an instruction as to the consequences of the jury's failure to agree "has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role--when deliberations break down and the jury is unable to produce a unanimous sentence recommendation." *Jones v. United States*, 527 U.S. at 382. To suggest, as does Sattazahn, that a jury who decided not to fulfill its role and follow its oath thereby created a life and liberty interest in the defendant as to the result of that failure makes a mockery of the judicial system.

The trial judge instructed the jury that it had to reach a unanimous agreement on a death sentence and that, if it could not agree unanimously on death, it had two immediate options

- to continue deliberating or, if all of them agreed, to stop deliberating and sentence the defendant to life. J.A., 18. Only after conscientious and thorough deliberations, should the jurors report to the judge that they were unable to reach a verdict. J.A., 18. Sattazahn suggests that the instruction that the judge will impose life if the jury fails to reach a unanimous verdict removes the incentive for the jury to conduct proper deliberations. He further suggests that the failure of the court to tell the jury that, if the defendant appealed and won, the Commonwealth could again seek the death penalty, provides no notice that the sentence might change.

Nothing in the Pennsylvania statute supports this subjective reading of the court's instructions. The statute simply informs the jury what will occur procedurally if the jury does not reach a unanimous agreement as to sentence. The instruction does not relieve the jury of its duty to deliberate and should not be so construed.

Furthermore, Sattazahn's jury was given no information concerning the effect subsequent appeals might have on the permanency of the sentence they imposed. Nothing in the sentencing statute or Pennsylvania Suggested Standard Jury Instructions requires, provides or even allows such information to be communicated to the jury. To argue that such should occur would break with all prior history of the Commonwealth.

Sattazahn himself received notice from the language of the statute itself that a death penalty proceeding is mandated following a first degree murder conviction. 42 Pa.C.S. § 9711(a)(1). In addition, the Supreme Court of Pennsylvania has specifically held that its interpretation of the death penalty statute demonstrates that the Pennsylvania legislature did not regard a life sentence imposed due to a deadlocked jury as equal to a jury unanimous verdict of life imprisonment.

Sattazahn, 563 Pa. at 548-49, 763 A.2d at 367-68 (quoting *Martorano*, 535 Pa. at 199, 634 A.2d at 1072).

The Pennsylvania death penalty statute does not exist in a vacuum. Interpretations of acquittals, double jeopardy and higher sentences upon retrial abound in federal case law and did so at the time Sattazahn was tried, appealed and was retried. *(See North Carolina v. Pearce*, 395 U.S. 711; *Chaffin v. Stynchcombe*, 412 U.S. 17; *Richardson v. United States*, 468 U.S. 317; *Poland v. Arizona*, 476 U.S. 147; *Schiro v. Farley*, 510 U.S. 222). The Supreme Court of Pennsylvania has held that the double jeopardy provisions of the Pennsylvania and United States Constitutions involve the same meaning, purpose and end. *Commonwealth v. McCane*, 517 Pa. 489, 500 n.5, 539 A.2d 340, 346 n.5 (1988). To claim that the failure of the first trial court to notify the jury that, if the defendant appealed, he may again face the death penalty created some life and liberty interest in Sattazahn to the life sentence imposed as a result of a deadlocked jury, ignores many other clear notices of that fact.

Sattazahn also claims that the mandatory nature of the imposition of the life sentence upon deadlock creates in him a life and liberty interest in the life sentence imposed. The Commonwealth would agree that, at the time the jury is deadlocked, the statute creates in the defendant a life and liberty interest in the imposition of a life sentence, according to the dictates of the statute. The default provision in the statute protects severely limited judicial resources. If a new penalty proceeding were held every time a death penalty jury deadlocked, the entire trial would almost always have to be retried before a newly empaneled jury since the government generally incorporates all the trial testimony into the penalty proceeding. Therefore, the default provision makes good sense in the event of a deadlocked jury. Making it mandatory maintains the necessary consistency in death penalty proceedings.

However, if a new trial is ordered at the request of the defendant, then all the resources required to conduct the second penalty proceeding will be in place for the new trial. Since the defendant has never been acquitted of death, there is no constitutional bar to conducting a second penalty proceeding after the second trial. The legislative decision to provide for a default life sentence does not in any way show an intent to preclude the death penalty on retrial. *See Sattazahn*, 563 Pa. at 549, 763 A.2d at 368 (quoting *Martorano*, 535 Pa. at 199, 634 A.2d at 1072). In fact, 42 Pa.C.S. § 9711(a)(1) mandates a death penalty proceeding whenever a jury returns a first degree murder verdict. Therefore, the mandatory nature of the default provision does not support Sattazahn's claim.

The last argument Sattazahn makes to establish his life and liberty interest in the default life sentence imposed by the judge when the jury deadlocked is the fact that Pennsylvania makes no statutory distinction of any kind between the treatment of life sentences imposed by "judicially directed verdicts" and a jury's unanimous verdict. To the contrary, the Supreme Court of Pennsylvania has specifically held that the Pennsylvania legislature did not regard a life sentence imposed due to a deadlocked jury as equal to a jury's unanimous verdict of life imprisonment, and distinguished them within the statute. *Sattazahn*, 563 Pa. at 548-49, 763 A.2d at 367-68 (quoting *Martorano*, 535 Pa. at 199, 634 A.2d at 1072). As the final arbiter of Pennsylvania law, the Supreme Court of Pennsylvania's interpretation of Pennsylvania law is binding on Sattazahn. *Brady v. Maryland*, 373 U.S. 83, 90 (1963).

There are two very distinct processes outlined in the statute for arriving at a life sentence - a unanimous jury verdict in favor of life and a default provision upon the jury's deadlock. Logically, they cannot be viewed as the same thing. If they were the same thing, then 42 Pa.C.S. § 9711(c)(1) would have stopped at subsection (iv) where it provides: "The verdict must

be a sentence of life imprisonment in all other cases." However, the legislature did not stop there. It added a provision in (v) that specifically takes a sentence imposed as a result of a deadlocked jury out of the "verdict" provision of the statute. In addition, in the judge imposed life sentence, there is no requirement that any findings be made. Since the statute does in fact differentiate between a life sentence imposed by the judge and a unanimous verdict for life returned by a jury, this argument must fail.

When a state provides for a jury to impose criminal punishment, the defendant has "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Hicks v. Oklahoma*, 447 U.S. at 346. Therefore, he has a liberty interest in the jury's being informed of all the sentences which it can impose. *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002) (citing *to Hicks*, 447 U.S. 343, 346). Sattazahn's jury was informed that it could by unanimous agreement sentence him to life imprisonment or death.

When a state chooses to create procedures which have an integral role in the system for finally adjudicating the guilt or innocence of a defendant, the procedures used must comply with due process. *Ohio v. Woodward*, 523 U.S. at 278. Therefore, since Pennsylvania chooses to have a death penalty, its procedures must comport with the Due Process Clause.

Sattazahn's due process claim centers on a showing that the statute created an undisturbable individual right for him in a life sentence imposed as the result of a deadlocked jury. The only right the Pennsylvania death penalty statute created with regard to the default life sentence was that it be imposed in the event of a deadlocked jury. The life sentence was imposed pursuant to the statute's requirements. Due process protected Sattazahn from any arbitrary imposition of the death penalty at

both trials through the full panoply of pretrial, trial and appellate procedures for both the guilt and penalty phases. However, neither the Due Process Clause nor the Pennsylvania statute created any entitlement to a life sentence in Sattazahn beyond the first trial.

CONCLUSION

For all the reasons offered above, the Commonwealth of Pennsylvania respectfully requests that this Court affirm the sentence of death imposed upon David Sattazahn.

Respectfully submitted,

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